In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 561

MARINE INSURANCE COMPANY, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order and memorandum of the district court (Pet. App. 1-3) are not reported. The opinion of the court of appeals (Pet. App. 4-10) is reported at 378 F. 2d 812.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1967. The petition for a writ of certiorari

was filed on August 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the instant suit was barred by the provision of the Federal Tort Claims Act relating to "[a]ny claim" for "loss" or "negligent transmission" of "postal matter".

STATUTES INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680(b) provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
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> * * * *

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

* * * *

STATEMENT

On November 3, 1964, a package containing emeralds valued at $152,190, and insured by the petitioner, was mailed via parcel post, air mail, from Geneva, Switzerland, to an importer in New York City. The package arrived by routine mail delivery at the "Mail Division" of the United States Customs Building in New York City. At the Mail Division, a branch of the Bureau of Customs, customs officials inspect foreign mail and fix the duties on it pursuant to 19 C.F.R. 9.1, *et seq.* The only items processed there are mail parcels (R. 81a).[1] The Mail Division had recently experienced a series of thefts of valuable packages, and the postal and customs investigators working at the Mail Division decided that the package in question would be an appropriate one to use to trap the thieves. Accordingly, they removed the package temporarily from routine processing, took it to the General Post Office, and injected it with fluorescent powder. The package was then sent back to the Mail Division for completion of the normal processing procedure (R. 82a, 83a). Although efforts were made to keep the package under close surveillance, and teams of investigators were tracking its course, the investigators lost sight of the parcel after it reached the

[1] "R." refers to the pages of the Appendix prepared for the use of the Court below, 10 copies of which petitioner has filed with this Court.

work area of a customs employee named Madell Collins. Collins' duties included filling out arrival forms for all incoming mail parcels valued at more than $250 (R. 81a-82a). At that stage of processing the package disappeared. Although investigators discovered part of the wrappings of the parcel in Collins' work jacket, the emeralds were never recovered.[2]

After reimbursing its assured for the loss of the package, petitioner as subrogee of any claims brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), against the United States to recover the value of the emeralds. The government moved for summary judgment for failure to state a claim upon which relief may be granted, relying upon the exception in 28 U.S.C. 2680(b), which provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * *
>
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.[3]

The district court rejected petitioner's contention that this exemption does not apply to items in the custody of the customs authorities, and granted the motion

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[2] Collins was subsequently arrested and prosecuted for the theft of the package, and he was convicted upon the evidence, *inter alia*, that his body bore traces of the fluorescent powder. The conviction was affirmed in *United States* v. *Collins*, 349 F. 2d 863 (C.A. 2), certiorari denied, 383 U.S. 960.

[3] The government had also raised the affirmative defense that the loss arose out of a discretionary function of government employees within 28 U.S.C. 2680(a) (R. 7a).

for summary judgment.[4] The court of appeals affirmed.

In holding that the package at issue was "postal matter" within the meaning of 28 U.S.C. 2680(b), the court of appeals pointed out that Congress did not intend that "mail" lose its character as "postal matter" when temporarily in the custody of the customs authorities. The Second Circuit went on to note that after the investigators had treated the package with the fluorescent powder, they returned it to the normal channels of mail, and it was not stolen until three days later. Thus,

> [w]hen stolen, the package was being processed in the same way it would have been processed if the inspectors had never singled it out for special surveillance. Although those committing this package to the postal system did not contemplate and probably would not have approved the use of their package as a decoy, they have no cause for complaint. The package was not stolen while exposed to any special risk. It had not been placed in an unusually vulnerable position but was stolen while it was in the normal flow of mail. There is every reason to believe that the theft would just as surely have occurred at the same desk if the package had not been first removed to treat it with the fluorescent powder and then replaced. Hence if there were ever to be a case for qualifying the general language of the statute, this would not be it. [Pet. App. 9-10.]

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[4] By stipulation, the record in *United States* v. *Collins*, *supra*, was before the court on this motion (R. 24a).

ARGUMENT

The court of appeals was clearly correct in holding the package to be "postal matter" within the meaning of 28 U.S.C. 2680(b). The package of emeralds had been mailed in Switzerland, had not yet reached its addressee in the United States, and was lost while undergoing routine processing along with other items of foreign mail in the Mail Division of the Customs Building. Furthermore, the evidence fully supports the finding that at the time the package was stolen it was in the normal flow of the mail, subject to no hazard greater than any other piece of mail, in as much as the package was stolen by Collins in the course of his duties of registering all parcels of mail valued at over $250. (R. 81a-82a).

1. Congress intended by 28 U.S.C. 2680(b) that activities of the government in performing postal services should be free from the threat of damage suits for the loss of mail; it did not intend that only activities of Post Office employees be protected. This scope is demonstrated by the language of the statutory provision, for it defines the exemption not in terms of the stage of processing or identity of employees involved when the item goes astray, but rather speaks in terms of the article which has been lost: "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." The statutory language makes no specific reference to Post Office employees. If Congress had intended to define the coverage of the exemption in terms of the employees who were handling the items, it knew

how to express exactly that, for the next exception in the Act, 28 U.S.C. 2680(c), is cast in precisely such terms:

> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise *by any officer of customs or excise or any other law-enforcement officer.* [Emphasis added.]

Especially when foreign mail is involved, employees of other federal agencies, such as the Bureau of Customs, are necessarily involved in the handling of the mail, and Congress certainly must have been aware of this. The manner in which Congress has defined the exemption in 28 U.S.C. 2680(b) clearly indicates a purpose to preserve the government's immunity from suit for claims arising out of any stage in the handling of mail; there is no conceivable reason why a package should cease to be "postal matter" while proceeding along an intermediate routing through customs authorities.

2. Petitioner claims a conflict with the prior decision of the court below in *Alliance Assurance Company, Ltd.* v. *United States*, 252 F. 2d 529 (C.A. 2). In that case a cargo of foreign woolens was shipped (not mailed) to New York; upon arrival, the goods were placed in a warehouse in the United States Customs Building for processing by the customs officials. The goods mysteriously disappeared from the warehouse and were never recovered. The court of appeals held that there was jurisdiction under the Federal Tort Claims Act and that the exemption in 28 U.S.C.

2680 (*c*), *supra*, p. 7, dealing with detention of goods by customs officers, did not apply. The court emphasized that since the goods involved there were not being sent by mail and were not being handled by the postal system, the issue did not involve subsection (b). See F. 2d at 534.

Actually in point is the Second Circuit's decision in *United States* v. *Collins*, 349 F. 2d 863 (C.A. 2), certiorari denied, 383 U.S. 960, the case in which Madell Collins was convicted of the theft of the very package involved here. The court of appeals there affirmed Collins' conviction for theft of "mail" in violation of 18 U.S.C. 1708. It explicitly rejected Collins' argument that the package had lost its character as mail because it was used as a decoy and was in the custody of customs, rather than Post Office, employees. See 349 F. 2d at 866.

The decision below is consistent with the Second Circuit's prior decisions, does not conflict with the decision of any other circuit, and is clearly correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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